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## MEMORANDUM

**TO:** Committee on Legal Services

**FROM:** Megan Waples, Office of Legislative Legal Services

**DATE:** December 5, 2018

**SUBJECT:** Rules of the Executive Director of the Department of Public Safety, Division of Fire Prevention and Control, concerning persons dealing with fireworks, 8 CCR 1507-12 (LLS Docket No. 180231; SOS Tracking No. 2018-00097).<sup>1</sup>

### Summary of Problem Identified and Recommendation

Section 24-4-104 (6), C.R.S., states that "[e]xcept as provided in subsection (4) of this section, an agency shall not revoke [or] suspend...a previously issued license until after holding a hearing as provided in section 24-4-105." Rule 4.9 of the Executive Director of the Department of Public Safety (Department) states that when the Executive Director suspends or revokes a license, the Department must provide a notice to the license holder that "shall state the reasons for...suspension or revocation and state that upon a written request a hearing before the issuing authority shall be held." It further requires that, "[u]pon notice of the revocation or suspension of any license, the former license holder shall immediately surrender to the Executive Director of the Department of Public Safety the license and copies thereof." **Because Rule 4.9 conflicts with the statute, we recommend that Rule 4.9 of the rules of the Executive**

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<sup>1</sup> Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2019, unless the General Assembly acts by bill to postpone such expiration.

**Director of the Department of Public Safety concerning persons dealing with fireworks not be extended.**

## **Analysis**

### **1. Rule 4.9 conflicts with statute because it allows the Executive Director to suspend or revoke a license without holding a hearing.**

Under Colorado law, a business license is a "property right which is entitled to due process protection."<sup>2</sup> To provide that protection, the "State Administrative Procedure Act" (APA), article 4 of title 24, C.R.S., requires that a licensee receive notice and an opportunity to be heard before the state takes action against that right.<sup>3</sup> Specifically, section 24-4-104 (6), C.R.S., provides:

**24-4-104. Licenses – issuance, suspension or revocation, renewal.** (6) Except as provided in subsection (4) of this section, an agency shall not revoke, suspend, annul, limit, or modify a previously issued license until after holding a hearing as provided in section 24-4-105.

As an exception to the general requirement to have a hearing before taking action, subsection 24-4-104 (4), C.R.S., allows a summary suspension of a license when the violation is willful and deliberate or the agency finds that emergency action is necessary:

**24-4-104. Licenses – issuance, suspension or revocation, renewal.** (4) (a) Where the agency has objective and reasonable grounds to believe and finds, upon a full investigation, that the **licensee has been guilty of deliberate and willful violation or that the public health, safety, or welfare imperatively requires emergency action and incorporates the findings in its order, it may summarily suspend the license pending proceedings for suspension or revocation which shall be promptly instituted and determined.** For purposes of this subsection (4), "full investigation" means a reasonable ascertainment of the underlying facts on which the agency action is based.  
**(Emphasis added.)**

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<sup>2</sup> *Mr. Lucky's, Inc. v. Dolan*, 591 P.2d 1021, 1022 (Colo. 1979).

<sup>3</sup> See, e.g., *Weiss v. Dep't of Public Safety*, 847 P.2d 197, 199 (Colo. App. 1992); § 24-4-105 (1), C.R.S.

The Department's Rule 4.9, however, allows the agency to suspend or revoke a license immediately upon notice to a licensee and allows for a hearing only if the licensee makes a request in writing:

#### **4.9 Procedure on denial, suspension or revocation**

**In any case where the Executive Director denies, suspends, or revokes a license, the Department shall notify the applicant or license holder. Said notice shall state the reasons for denial, suspension or revocation and state that upon a written request a hearing before the issuing authority shall be held.**

**Upon notice of the revocation or suspension of any license, the former license holder shall immediately surrender to the Executive Director of the Department of Public Safety the license and all copies thereof.**

The period of denial, suspension or revocation shall be within the sound discretion of the Executive Director.

Any hearing requested pursuant to this section shall be conducted by the Executive Director or an Administrative Law Judge on behalf of the Executive Director pursuant to the provisions of the "State Administrative Procedure Act", Article 4 of Title 24, C.R.S.

Any person aggrieved by the decision or order of the Executive Director of the Department may seek judicial relief pursuant to the provisions of C.R.S. 24-4-106. **(Emphasis added.)**

The Rule's provisions violate the plain language of section 24-4-104 (6), C.R.S., by allowing the Executive Director to suspend or revoke a license without holding a hearing first. The provision allowing the "former license holder" to request a hearing after the fact cannot save the rule because the statute explicitly states that the agency shall not take such action "until after holding a hearing." Because it allows the Executive Director to revoke or suspend a license without a hearing, the rule conflicts with the statute.

Additionally, the Department's rule does not satisfy the exception created in section 24-4-104 (4), C.R.S. Rule 4.9 is not limited to situations in which the Department has made the necessary finding that the violation is willful and deliberate, or that the public health, safety, or welfare imperatively requires emergency action, and therefore does not fall within the scope of the exception. But even assuming the Department was able to make such a finding in every case, the statute still requires that proceedings for suspension or revocation are "promptly instituted" by the agency. This requirement balances the state's need to take emergency action with the license holder's right to due

process protections for their property.<sup>4</sup> Rule 4.9, however, allows the agency to summarily suspend or permanently revoke a license without ever holding a hearing, unless the licensee requests one. Because the Rule shifts the burden to initiate proceedings on the licensee, contrary to the language of the statute, it also violates the exception for emergency suspensions if that subsection applied.

## **2. The agency's grant of rulemaking authority does not allow it to depart from the requirements of the APA.**

Section 24-33.5-2004 (7), C.R.S., grants the Executive Director authority to promulgate rules to implement the provisions of part 20 of article 33.5 of title 24, including requirements for certifications and other requirements reasonably necessary for the safety of workers and the public. Section 24-33.5-2011 (2), C.R.S., however, specifies that revocation or suspension proceedings for licenses issued under part 20 shall be brought pursuant to the provisions of the APA:

**24-33.5-2011. Denial, suspension, or revocation of or refusal to re-new license.** (2) The revocation or suspension proceedings shall be brought by the Colorado executive director of the department of public safety pursuant to the provisions of the "State Administrative Procedure Act", article 4 of title 24.

Because the Department's rule allows it to immediately suspend or revoke a license without conducting or initiating a hearing, it conflicts with the requirements of the APA.

## **Recommendation**

We therefore recommend that Rule 4.9 of the rules of the Executive Director of the Department of Public Safety concerning persons dealing with fireworks not be extended because it conflicts with the requirements of section 24-4-104 (6), C.R.S.

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<sup>4</sup> See, e.g., *Motor Vehicle Dealer Bd. v. Castro*, 914 P.2d 517, 518 (Colo. 1996); *Sanchez v. State*, 730 P.2d 328, 332 (Colo. 1986).